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No. .....

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The Supreme Court of the United States

October Term, 1982

DONALD LESIAK,

Petitioner,

Petitioner,

vs.

THOMAS E. FERGUSON,

AUDITOR OF THE STATE OF OHIO,

Respondent

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

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June 10, 1983

QUESTIONS PRESENTED

The Ohio Supreme Court determined that a substantial constitutional question was not presented by the conduct of the Court of Appeals in upholding the discharge of petitioner by respondent in a Judgment and decision deliberately evading the failure of the Common Pleas Court to address two

of the Common Pleas Court to address two constitutionally controlling issues in First Amendment discharge cases: The first such controlling issue evaded is whether petitioner would have been discharged in the absence of constitutionally protected speech for his oral statements, <u>not published and not known</u> to the Auditor at the time of discharge, that he intended to recommend findings for recovery against the Clerk of City Council and the Secretary of the Civil Service Commission. The second such controlling issue evaded is

the absence of any evidence showing any impairment in the efficiency of the Auditor's office by such oral statements. The questions presented are:

1. Did the conduct of the Court of Appeals in deliberately refusing to address, consider and determine these two

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controlling constitutional issues deprive petitioner of his right under the First Amendment to respond truthfully to the attempt by respondent Auditor to unfairly, falsely and publicly blame the City of Cleveland's default on petitioner in an attempt to cover up and conceal the Auditor's own misfeasance, malfeasance, and non-feasance?

2. Should state courts in cases involving the discharge of a public employee

for speech conduct be required to demonstrate by their decisions that they have made the constitutionally required searching review of the evidence to assure that the discharge was made with the due deference to be accorded a public employee's First Amendment rights?

3. Can the discharge of a public employee for the exercise of his First Amendment rights be constitutionally justified in the absence of any evidence showing interference with the efficiency of the public services performed by him or his agency?

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Judgment and Opinion of The Supreme Court of Ohio (March 16, 1983) A1

Opinion and Judgment of the Court of Appeals of Cuyahoga County, Ohio (November 10, 1982) A2

Opinion and Judgment of the Common Pleas Court of Cuyahoga County, Ohio (October 13, 1981) A27

Opinion and Judgment of the State Personnel Board of Review (November 29, 1979) A53

Application for Reconsideration filed with Court of Appeals of Cuyahoga County, Ohio (November 22, 1982) A73

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CONSTITUTIONAL PROVISION AND STATUTE:

First Amendment, United States Constitution 1, 2, 3, 7, 8, 16, 18, 20, 24, 27

28 U.S.C. §1257 (3) 8

CASES:

Givhan v. Western Line Consolid. Sch. Dist., 439 U.S. 410, 58 L.Ed. 2d 619 99 S.Ct. 693 (1979) 24

Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2d 811, 88 S.Ct. 1731 (1968) 24

Tygrett v. Barry, 627 Fed. 2d 1279 (D.C.Cir. 1980) 24

OPINIONS BELOW

The Judgment and Opinion of The Supreme Court of Ohio on March 16, 1983, is set forth verbatim:

> "This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein."

The Opinion and Judgment of the Court of Appeals of Cuyahoga County, Ohio, dated November 10, 1982, is reported at 4 Ohio App. 3d 244 and is appended at Appendix p. A2 herein.

The Opinion and Judgment of the Common Pleas Court of Cuyahoga County dated October 13, 1981, and of the State Personnel Board of Review, dated November 29, 1979, are not reported. They are appended at Appendix p. A27 and p. A53, respectively.

GROUND FOR JURISDICTION

Donald Lesiak prays that a writ of certiorari be granted to review the Judgment of The Supreme Court of Ohio entered March 16, 1983, dismissing his appeal as of right on the ground that no substantial federal or state constitutional question was involved in the deliberate refusal of the Court of Appeals for Cuyahoga County to consider and address two controlling constitutional issues in a First Amendment case involving the discharge of a public employee for speech conduct.

An appeal as of right for want of a substantial constitutional question and a Motion To Certify the Judgment of the Court of Appeals were denied by the Supreme Court by orders dated March 16, 1983. This appeal is being docketed in this Court within 90 days of the denial of an appeal as of right. The jurisdiction

of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS

First Amendment, United States Constitution

Congress shall make no law . . . abridging the freedom of speech . . .

abridging the freedom of speech . . .

STATEMENT OF THE CASE

MATERIAL FACTS

Petitioner, Donald Lesiak, became Examiner-In-Charge of the City of Cleveland audits in April, 1976, a position which he held until approximately a month after the City of Cleveland, on December 15, 1978, became the the first major American city to default since the Depression. On January 15, 1979, petitioner was transferred out of the City of Cleveland to the post of Examiner-In-Charge of the North-

eastern Ohio University audits at Cleveland State University. It was not disputed that respondent transferred petitioner at the request of City Officials who felt that petitioner's transfer would be "in their best interest."

Shortly after he first assumed responsibility for the City's audits, petitioner became aware of the disarray and disorder in the financial records of the City of Cleveland and the flagrantly illegal fiscal practices of the City's managers. During his tenure auditing Cleveland, petitioner repeatedly and continuously warned and attempted to force the Auditor to take action to stop the apparent violations of state law and of the municipal charter in the fiscal management of Cleveland. Among other things, he pressed the Auditor for additional examiners, objected to material deletions from his audit re-

ports, and requested legal action to stop these illegalities, public hearings to expose them, and the use of the Auditor's subpoena powers if necessary.

On December 13, 1978, two days before the City of Cleveland went into default, petitioner completed a memorandum to his superior in Columbus making numerous recommendations, the most important of which was the use of extraordinary legal remedies to require the City Officials to stop their flagrant violations of state and city laws.[1/]

To cover up the real reason for petitioner's transfer out of the City of Cleveland, respondent had a press release

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1/ Such legal remedy, if invoked, would have substantially impeded, if not destroyed, the ability of Mayor Dennis Kucinich to continue to illegally spend capital funds for general fund expenses.

prepared creating the impression that petitioner was being demoted from his status as Examiner-In-Charge to that of a resident examiner. This reassignment was accompanied by a banner headline article in The Cleveland Plain Dealer[2/] quoting extensively from petitioner's successor, Mr. William Hart. This article strongly insinuated that the chaos in Cleveland's books was due to petitioner's deficiencies. Mr. Hart's remarks suggested that Lesiak's previously permissive attitude would be changed by Hart who would "demand" that the City account for every cent it received and spent, that City Officials should have been cited long ago for their fiscal mismanagement, and that he, Hart, would take the necessary action.

2/ Ohio's largest newspaper, with a daily circulation of 379,615 at that time.

On January 18, 1979, petitioner sent a letter of petition for redress requesting the Auditor to rectify the false impression created by the newspaper articles. This request went unanswered by respondent.

When he received no satisfaction, petitioner then began writing what turned out to be a 56-page letter and supporting attachments to the publisher of The Cleveland Plain Dealer. This letter detailed the circumstances of his tenure as Examiner-In-Charge of City of Cleveland audits in order to demonstrate that petitioner was not in any way responsible for the chaos in the City's financial records or for the respondent's failure to use the power of his office to halt the continuing fiscal illegalities of two City administrations.

This letter was delivered on May 2,

1979. On May 2, 1979, Lesiak also participated in a three hour interview with a Plain Dealer reporter. On May 4, 1979, before any news story was published, petitioner was removed for violation of the Auditor's oral press relations policy.

The Order Of Removal describing the specific instances of petitioner's violation made no reference to his oral statement to the newspaper reporter that he would recommend findings for recovery against certain City Officials but described the violation as an interview "regarding administrative procedures and policies regarding field audits of the Auditor of State's office" and sending written documents "regarding field audits" to the editor of The Plain Dealer."

At the hearing before the State Personnel Board of Review, respondent took the position that petitioner would not

have been discharged but for his oral statements to the reporter that he intended to recommend findings for recovery against certain City Officials. The only evidence that respondent knew of petitioner's statements with reference to findings for recovery at the time of petitioner's discharge was indirect and implied from the testimony of respondent that but for such oral statements petitioner would not have been discharged. There was no evidence or testimony that these oral statements regarding findings for recovery were ever published or communicated to anyone by the newspaper reporter.

At no time in the record did the Auditor explain the substantial and material contradiction arising unequivocally from the absence of any reference in specifications of the removal order to such recommended findings.

Even though the Auditor testified that he consulted with his Chief Deputy, with his legal advisor, and with his public information officer before making the discharge, these three subordinates, in their testimony, nowhere suggested that they knew or were aware of any statements with reference to findings for recovery at the time of petitioner's discharge. No memoranda, other than the Removal Order, were prepared by the Auditor or any of his subordinates with reference to the circumstances and reasons for the discharge.

The contention of petitioner before the Common Pleas Court that the State Personnel Board of Review erred in presuming that such comments with reference to findings for recovery necessarily impeded petitioner's ability to perform his job was answered by the trial judge by the conjec-

ture[3] that petitioner's effectiveness would be substantially impaired because "any person dealing with that individual in a degree of confidence in the future would have to be leery."

RAISING THE CONSTITUTIONAL QUESTION

In the opening statement of petitioner before the State Personnel Board of Review Hearing Officer, the statement was made at page 23 of the transcript that:

> "Donald Lesiak went to the Plain Dealer only as a last resort to protect and clear his name by exercising one of the most fundamental rights available to an American citizen, the right of free speech.... Donald Lesiak did not exercise this First Amendment right lightly and precipitously...."

In Objection No. IV to the Report and

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[3] Inasmuch as there was no evidence that such comments were ever publicized.

Recommendation of the Hearing Officer, petitioner specifically asserted:

> "The failure of the hearing officer to consider whether Donald Lesiak's removal promoted the efficiency of the public service and thus constituted a justified penalty for his comments on matters of public concern or whether he was removed to discredit him in order to preserve the power and interest of the auditor to use his office to protect powerful politicians in their continuing deliberate violations of the law."

In Objection No. VIII it was asserted:

> "The analytical premise of the hearing officer that any violation of a post-audit conference 'necessarily impedes' an examiner's ability to perform his daily duties is not justifiable."

In the Notice of Appeal filed by appellant to the Common Pleas Court, the failure of the Hearing Officer to consider the evidence and determine whether, in fact, appellant was removed in the interest of promoting the efficiency of the public service was asserted in Ground I.

In Ground III, it was claimed that:

> "the removal of Donald R. Lesiak was in violation of his rights of freedom of speech under the First . . . Amendment of the United States Constitution."

In Ground VII it was asserted that the Hearing Officer's presumption that any violation of a post-audit conference necessarily impeded petitioner's ability to perform his daily duties, rather than requiring evidence to show such to be the fact, was contrary to law.

Before the Court of Appeals, the violation of petitioner's First Amendment rights was expressly asserted in Assignment of Error No. 1. (Journal Entry and Opinion of Court of Appeals of Cuyahoga County, Appendix p. A2.) Issue 2 in the Statement of Issues Presented was as follows:

> "2. Where the testimony of the Auditor is that he would not have fired Appellant except for Appellant's comments to the press that he was going

to make findings for recovery against two public officials in a pending audit, can the discharge be upheld on the basis that such comments substantially impaired Appellant's effectiveness in his continued employment because future auditees would be leery of him, where there is no evidence that such comments appeared in the newspapers or were otherwise known to any future auditee and, therefore, could not affect their attitude toward Appellant?"

The failure of the trial court to address and determine the issue of whether petitioner would have been discharged regardless of his oral statements to the newspaper reporter with reference to findings for recovery because of his constitutionally protected criticism of the Auditor was directly raised as a ground for reversal at page 2 of petitioner's Application For Reconsideration filed with the Court of Appeals. Appendix p. A73.

In petitioner's Memorandum In Support Of Jurisdiction filed with The Supreme Court of Ohio, the necessity of a court

conducting an individualized and searching review in First Amendment public employee firings was asserted in Proposition Of Law No. 4. Proposition Of Law No. 2 asserted the obligation of a public employer to show that the decision to discharge would have been reached in the absence of protected speech. Proposition Of Law No. 3 asserted the necessity of finding an interference with the efficiency of the public services performed. Proposition Of Law No. 5 was as follows:

> "Where the evidence shows that the motivating factor for an employee's discharge was criticism of his employer, it is error to uphold a discharge for remarks to a reporter, which the evidence shows were not known to the employer at the time of the discharge, were never published and, therefore, could not have reasonably been expected to impair Appellant's ability to efficiently continue to carry out his responsibility for University audits."

The deliberateness of the evasion by the Cuyahoga County Court of Appeals of

the two controlling constitutional issues was first raised in footnote 1 of the Application For Reconsideration by pointing out to the Court of Appeals other instances where the Cuyahoga County Court of Appeals deliberately misconstrued the record and the law in order to accomplish "just results." Reference was made to the undisputable logic of the aphorism that mistakes are corrected or explained whereas deliberate conduct is permitted to stand, without explanation.[4/]

At page 3 of the Memorandum In Support

4/ The attempt of counsel for appellant to correct this serious malfunction in the Ohio justice system by bringing it to the attention of the judges involved has succeeded only in subjecting counsel to a disciplinary investigation by the disciplinary authorities of Ohio. It has, as yet, not engendered a single response or explanation to an Application For Reconsideration when such errors have been pointed out.

Of Jurisdiction, it was specifically asserted to the Supreme Court that the two controlling constitutional issues had been deliberately evaded by the Court of Appeals because they could not be reasonably answered without demonstrating the unconstitutionality of petitioner's discharge.

REASONS FOR GRANTING THE WRIT

Where the interests of powerful politicians are concerned, Ohio is a lawless state because of the traditional reluctance of Ohio's elected judges and justice system to hold such politicians accountable for their illegal conduct.[5/] So

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[5/] The effects of such a tradition is dramatically exemplified by the circumstance that an elected state official has not been indicted in over 50 years. These effects, in recent years, include a Chairman of the Industrial Commission orally ordering, without knowledge of the other

(Footnote 5 concluded on next page.)

long as Ohio judges themselves believe they will not be held accountable by this Court, or by anyone else, for their part in Ohio's lawlessness in this type of a case, the citizens of Ohio will continue to be deprived of the basic guarantees of due process of law and of free speech when

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(Conclusion of Footnote 5)
two Commissioners, hundreds of thousands of dollars of refunds to a single employer, and another Chairman, again alone, forging an award used to purchase the Chairman's home. Respondent-Auditor had his subordinates forge and falsify financial documents so that he could misappropriate funds appropriated for other purposes in order to deceive the public as to the cost of furnishing his suite of offices. No indictment was returned because the prosecutor could not find a law providing any criminal sanctions for evading controlling board and legislative procedures. A verdict of not guilty was directed by a court on behalf of the President of City Council of Cleveland on the grounds that it was not extortion for him to threaten the job rights of a lieutenant of the vice squad if he did not desist from making arrests of carnival employees for engaging in illegal gambling operations.

such guarantees impinge upon the interests of Ohio's political power brokers.

Despite the example afforded by the decisions of this Court in Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2d 811, 88 S.Ct. 1731 (1968) and Givhan v. Western Line Consolid. Sch. Dist., 439 U.S. 410, 58 L.Ed. 2d 619 99 S.Ct. 693 (1979), and numerous decisions of the federal courts aptly exemplified by the decision in Tygrett v. Barry, 627 Fed. 2d 1279 (D.C.Cir. 1980) demonstrating the obligation of a reviewing court in a public employee First Amendment discharge case to directly confront the controlling constitutional issues by conducting an individualized, objective, logical, and searching review of the evidentiary facts, the Justices of The Supreme Court of Ohio and the Judges of the Cuyahoga County Court of Ap-

peals have evidenced a complete lack of concern for this obligation in their stubborn determination to protect the interests of powerful public officials such as respondent.

This tradition and attitude will continue to chill the right of Ohio citizens to criticize their powerful elected public officials.

The right of free speech becomes a meaningless scripture in a state like Ohio when judges feel free to write decisions deceitfully and deliberately avoiding the law and the record by evading controlling constitutional issues. Only this Court can impress upon Ohio judges the incongruity of their conduct in a democracy.

Obviously, the media of Ohio have neither the experience nor the competence to hold such judges accountable for deliber-

ately ignoring and evading the legal effect of the lack of evidence in this case to show that petitioner's ability to carry out his audits of Northeastern Ohio Universities was in any way impaired, even though this controlling constitutional consideration was unequivocally presented to the Court of Appeals in petitioner's Brief for determination, as demonstrated by the following headings in petitioner's Brief:

"I.

THE CONCLUSION OF THE TRIAL JUDGE THAT APPELLANT'S STATEMENTS TO THE PRESS SUBSTANTIALLY IMPAIRED APPELLANT'S EFFECTIVENESS WAS BASED ON A MISTAKE AS TO THESE STATEMENTS AND THEIR EFFECT."

"II.

THIS COURT SHOULD DETERMINE WHETHER THERE IS RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE TO SUPPORT THE CONCLUSION THAT APPELLANT'S STATEMENTS SUBSTANTIALLY IMPAIRED HIS EFFECTIVENESS AS EXAMINER-IN-CHARGE OF NORTHEASTERN OHIO UNIVERSITIES."

"III.

THERE WAS NO EVIDENCE TO SHOW THAT THE EFFECTIVENESS OF APPELLANT IN HIS CONTINUED PUBLIC EMPLOYMENT WAS SUBSTANTIALLY IMPAIRED BY HIS STATEMENTS TO THE PLAIN DEALER."

"Since There Was No Evidence That Any Future Auditee Knew Of Appellant's Statements To The Reporter That He Was Going To Recommend Findings For Recovery, How Could They Be 'Leery' Of Him?"

This Court should exercise its power to make Ohio judges accountable so that Ohio citizens and public employees can enjoy the same First Amendment rights as their counterparts in most other states.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Certiorari and summarily reverse the Judgment of The Supreme Court of Ohio and remand the case for a determination on the merits after conducting an individualized and searching review of the factors asserted by respondent to justify petitioner's discharge.

In the alternative, this Court should note the probable jurisdiction of this appeal.

Respectfully submitted,

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